ing Armone's illness (Joint Pet. Cert. for Armone and Grammauta, p. 30).

It seems unjust that so novel and constitutionally dubious a doctrine as that here involved—that the constitutional right of the defendant to be present at his criminal trial may depend, either wholly or partly, on some *ad hoc* evaluation of the favorable *versus* the unfavorable character of the testimony received during his absence (or incapacity in the courtroom owing to illness)—should be allowed to be insinuated, as it were, into the corpus of the Federal case law, merely because a Trial Judge has "hedged" (again, we intend no disrespect) in his formulation of the "holding", or because a Court of Appeals has chosen a *sub silentio* method of affirming what the Trial Judge has done. The injustice of this, its constitutional offensiveness, is of course aggravated in a most concrete way in the present case because, as seen, *undisputedly* there was unfavorable testimony received during the defendant's incapacity in the present instance.

Notwithstanding the perhaps equivocal way in which the Trial Judge handled the issue, and the Court of Appeals' *sub silentio* form of approval of the Trial Judge's action, can there be any doubt, can any realistic practising criminal lawyer doubt, can this Court doubt, that the novel doctrine here involved which so drastically curtails the constitutional right of a defendant in a criminal case to be present at all stages of the trial, will henceforth be very much indeed in the forefront of the minds of prosecutors and Courts—and not only in the Second Federal Circuit?

This Court's protective intercession is needed; and it is needed the more so in this case precisely because the fright-

ening new doctrine in question apparently bids fair to be brought into the Federal case law by indirection, rather than by outright explicit "holding".*

II. The Government's Suggestion That No Overt Act Allegations Are Necessary in Conspiracy Prosecutions under 21 U.S.C. §174

In replying to petitioners contentions concerning Overt Act 10, the Government commenced its argument with the surprising suggestion that allegation and proof of an overt act is not an essential element of the conspiracy offense under 21 U.S.C. §174 (Br. in Opp. 10-11). Of the two cases cited by the Government, one is not in point, namely, *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7 1963), because *Garfoli* held only that an overt act need not be alleged and proved as to *each* conspirator-defendant. The other case cited by the Government, *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal. 1962) is in point, but this District Court decision stands solitary in the Federal case law on the subject. In the Second Circuit, at least, it appears to have been taken for granted down to the present time that allegation and proof of an overt act is required in conspiracy prosecutions under 21 U.S.C. §174. E.g., *United States* v. *Borelli*, 336 F. 2d 376 (C.A. 2 1964); *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2 1962); *United States* v. *Aviles*, 274 F. 2d 179 (C.A. 2 1960). In the instant case the Court of Appeals referred to the *Gardner* case, *supra*, but it noted

* The decisions cited by the Government at pp. 22-23 of the Brief In Opposition, for the proposition that "the ruling in this case, which rested on all the circumstances, was not an abuse of discretion", are not in point. None of those cases (Bentvena, Shotwell Manufacturing Company, Stein, Wellman) involved any issue of favorable *versus* unfavorable testimony.

that the Government did not urge any such contention, and it therefore deemed it unnecessary to explore the issue. If the law is now to be declared as being that allegation and proof of an overt act under 21 U.S.C. §174 are unnecessary, this Court's voice should be heard on so important a subject.

CONCLUSION

It is respectfully submitted that the joint petition for certiorari on behalf of petitioners Armone and Grammauta should be granted.

Respectfully submitted,

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